

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

KRISTINA MYERS,

Plaintiff,

v.

Case No. 17-2682-CM

VIRGIL BREWER, et al.,

Defendants.

ORDER

Defendant Virgil Brewer has filed a notice of appeal (ECF No. 36) of the memorandum and order entered by the presiding U.S. District Judge, Carlos Murguia, that, in relevant part, denied him qualified immunity (ECF No. 35). Defendant has also filed a motion to stay discovery and further court proceedings pending appeal (ECF No. 39). Plaintiff opposes the motion, asking the court to certify the appeal as frivolous and/or dilatory.

“[A]n interlocutory appeal from an order refusing to dismiss on ... qualified immunity grounds relates to the entire action and, therefore, it divests the district court of jurisdiction to proceed with any part of the action against an appealing defendant.”¹ Recognizing that such interlocutory appeals may be subject to abuse, the Tenth Circuit has held that the district court may regain jurisdiction if it takes the affirmative step of certifying the appeal as frivolous.²

¹ *Stewart v. Donges*, 915 F.2d 572, 576 (10th Cir. 1990).

² *Id.* at 577.

The court observes plaintiff-appellee has filed a motion to dismiss the appeal, claiming the Tenth Circuit lacks jurisdiction for essentially the reasons set forth in plaintiff's opposition to the motion to stay.³ The Tenth Circuit directed defendant-appellant to respond to the motion to dismiss by July 30, 2018, and defendant-appellant has filed a response.⁴ In light of plaintiff's motion pending before the Tenth Circuit, and the "axiomatic premise that a 'federal district court and a court of appeals should not attempt to assert jurisdiction over a case simultaneously,'" ⁵ defendant's motion to stay is granted.

IT IS HEREBY ORDERED:

1. Defendant Brewer's motion to stay (ECF No. 39) is granted.
2. The parties are directed to file a joint status report within **5 business days** after defendant Brewer's interlocutory appeal has been concluded, whether by ruling on plaintiff's motion to dismiss, or by ruling on the merits of qualified immunity.

IT IS SO ORDERED.

Dated August 3, 2018, at Kansas City, Kansas.

s/ James P. O'Hara
James P. O'Hara
U.S. Magistrate Judge

³ Case No. 18-3145, Doc. 010110026020.

⁴ Case No. 18-3145, Docs. 010110026280 and 010110029867, respectively.

⁵ *Stewart*, 915 F.2d at 574.